Supreme Court, U.S.
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No. 99-1807

IN THE

Supreme Court of the United States

JOSEPH V. TINELLI, SR.,

Petitioner,

v.

FRANK E. REDL, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

A. Did the Court of Appeals for the Second Circuit properly decline to certify an unresolved question of state common law to the highest court of the state and decide the question, relying solely on lower court precedent and decisions from other jurisdictions, and hold that under New York law the question whether the failure to perfect an appeal caused damages was a question of law for the Court and not a question of fact for the jury?

B. By declining to certify an unresolved question of state common law to the highest court of the state did the Court of Appeals for the Second Circuit give rise to a conflict with the decisions of this Court and other Circuit Courts concerning the applicable principles for determining the propriety of certification?

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STATEMENT OF THE CASE

Petitioner was retained by the Town of Pawling, New York (the "Town") as Chief Code Enforcement Officer ("CEO") in 1984. In December, 1988, the Town's Board voted to discharge Petitioner after five years of service. Petitioner retained Respondent, a solo practitioner, in connection with the Town's action.

Respondent advised the Town that its discharge of Petitioner violated the requirements of N.Y. Civ. Serv. L. § 75 (McKinney 1986) ("N.Y. Civ. Serv. L. §75")[1]. Thereafter, the Town served Petitioner with a Notice of Hearing, Statement of Charges and an Amended Statement of Charges. In March, 1989, two full days of hearings concerning the Town's charges against Petitioner were held before Stein, an impartial arbitrator appointed by the Town pursuant to N.Y. Civ. Serv. L. § 75.[2] Respondent represented Petitioner during these hearings.

In June, 1989, Stein issued his Opinion, Findings of Fact and Recommendation finding Petitioner guilty of two charges relating to his conduct toward women and one charge of failing to enforce the Town Code and recommending that

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1. N.Y. Civ. Serv. L. § 75(2) requires that a person against whom removal or other disciplinary action is proposed receive written notice thereof and be furnished with a copy of the charges and be allowed at least eight days for answering the same in writing.

2. N.Y. Civ. Serv. L. § 75(2) provides in relevant part that "[t]he hearing upon such charges shall be held by the officer or body having the power to remove the person against whom such charges are preferred, or by a deputy or other person designated by such officer or body in writing for such purpose."

Petitioner be discharged. The Town Board unanimously adopted Stein's recommendation and discharged Petitioner.

In July 1989, Respondent filed an Article 78 proceeding (the "Article 78 proceeding"), essentially an appeal,[3] seeking to annul the Town's discharge of Petitioner. The Article 78 proceeding was transferred to the Appellate Division of the New York State Supreme Court at the Town's request, pursuant to N.Y. Civ. Prac. L. & R. 7804(g) (McKinney 1987) on October 18, 1989. The time to perfect the Article 78 proceeding expired in April, 1989. Respondent did not perfect the Article 78 proceeding nor did Respondent seek to enlarge the time in which to do so.

On April 18, 1996, petitioner commenced this action in the United States District Court for the Southern District of New York invoking that Court's diversity jurisdiction to recover damages against Petitioner,[4] *inter alia*, for legal malpractice. After the conclusion of discovery, Respondent moved for summary judgment asserting that Petitioner had failed to state any claims upon which relief could be granted. In support of that motion, Respondent admitted commencing but not perfecting the Article 78 proceeding and admitted that he did not move to enlarge the time to perfect the Article

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3. An appeal pursuant to Article 78 is a special proceeding to challenge, *inter alia*, "whether a determination was made in violation of a lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed." N.Y. Civ. Prac. L. & R. 7803 (McKinney's 1994).

4. Petitioner did appeal from that part of the District Court's Order that granted summary judgment in favor of co-defendant Hankin, Hanig, Stall & Caplicki.

78 proceeding. Respondent argued that under the applicable law, Petitioner would have been unsuccessful had the Article 78 proceeding been perfected. Accordingly, Respondent's failure to perfect the Article 78 proceeding did not cause Petitioner to suffer any damages. For purposes of the summary judgment motion, Respondent assumed, *arguendo,* but did not concede that he had a duty to perfect the Article 78 proceeding.[5]

In a Report and Recommendation dated November 17, 1998, United States Magistrate Judge Douglas Eaton recommended that summary judgment be granted to Respondent holding that

> the question of whether an appeal woul.' have been successful is a question of law — a question to be decided by "review of the transcript and record of the underlying action, the argument of counsel and subject to the same rules of review as should have been applied by the appellate courts."

(Appendix C, C-9-10). The Magistrate Judge, applying the New York Court of Appeals criteria for review of administrative hearings in Article 78 proceedings, found that the record of the Stein Hearings contained "substantial evidence" to support Stein's detailed findings and that Stein did not abuse his discretion in recommending Petitioner's discharge. (Appendix C, C-11-16). Finding that the Article

5. Petitioner misstates the facts by asserting that "[Respondent] conceded having had a duty and breaching it." (Petition at 5). Respondent's assumption, that he had a duty was duly noted by the Magistrate Judge in his Report and Recommendation. (Appendix C-9).

78 proceeding would not have been successful, the Magistrate Judge concluded that Petitioner had not suffered any damages as result of Respondent's failure to perfect the Article 78 proceeding.

On January 2, 1999, Petitioner objected to the Report and Recommendation arguing that causation issues were factual determinations and that the question whether the Article 78 proceeding would have been successful should not have been decided summarily, but rather, should have been presented to a jury. By Order dated January 27, 1999, The United States District Court for the Southern District of New York accepted the Report and Recommendation in its entirety and granted summary judgment to Respondent ruling that the question of an appeal's success, when raised in a legal malpractice action, was a question of law to be decided by the Court. (Appendix B, B-4). Judgment was entered in favor of Respondent on February 3, 1999. On March 2, 1999, Petitioner filed a Notice of Appeal from the District Court's judgment.

During oral argument of Petitioner's appeal, the Second Circuit raised, *sua sponte,* the possibility of certifying to the New York Court of Appeals the question of whether the success of an appeal when forming the basis for a legal malpractice action was one of law or one of fact. (Appendix A, A-7). Relying on the decision of a New York trial court and the opinions of 21 other jurisdictions who had uniformly addressed the issue, the Second Circuit declined to certify the question and predicted that the New York Court of Appeals would rule that in a legal malpractice action, the question whether damages resulted from an attorney's failure to perfect an appeal was a question of law to be decided by the Court. (Appeal A, A-7-8).

The Second Circuit affirmed the District Court's decision addressing only the issue of whether Petitioner had shown that Respondent's "breach of duty caused any damage, i.e., whether, but for [Respondent's] failure to perfect the Article 78 Appeal, [Petitioner] ultimately would have prevailed on appeal in challenging the finding of misconduct and incompetence and consequent termination of his employment." (Appendix A, A-6).

On March 17, 2000, Petitioner filed a Petition for a Writ of Certiorari from the Order and Judgment of the United States Court of Appeals for the Second Circuit in *Tinelli v. Redl*, 199 F.3d 603 (2d Cir. 1999). The petition was docketed on May 12, 2000. By letter dated June 7, 2000, Respondent's counsel requested an additional seven days in which to file Respondent's Brief in Opposition. By letter dated June 8, 2000, this Court granted Respondent an extension of seven days up to and including June 19, 2000 to file Respondent's Brief in Opposition. Respondent's Brief in Opposition is filed on June 19, 2000, pursuant to Supreme Court Rule 15.3 as extended by the Clerk of this Court.

REASONS FOR DENYING THE WRIT

A. The Court of Appeals for the Second Circuit properly declined to certify an unresolved question of state common law to the highest court of the state and decided the question, relying solely on trial court precedent and decisions from other jurisdictions, holding that under New York law the question whether the failure to perfect an appeal caused damages was a question of law for the Court and not a question of fact for the jury.

The rules of the Second Circuit permit certification of a question of law to the New York Court of Appeals where there is no controlling New York precedent on an issue. The Second Circuit may "certify to the highest court of a state an unsettled and significant question of state law that will control the outcome of a case pending before [the] Court." U.S. Ct. of App. 2nd Cir. Rule § 0.27 (1999). The correlative provision in the rules of the New York Court of Appeals gives that court the discretion to accept or reject a question so certified.

> Whenever it appears to the . . . United States Court of Appeals . . . that determinative questions of New York law are involved in a cause pending before it for which there is no controlling precedent of the Court of Appeals, such court may certify the dispositive questions of law to the [New York] Court of Appeals.

N.Y. Comp. Codes R. & Regs tit. 22 § 500.17.

The decision of a federal court to certify questions of law pursuant to state established procedures of this type rests in the sound discretion of the court. *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974). Historically, the Court of Appeals for the Second Circuit has only certified questions to the New York Court of Appeals in the following three circumstances: (i) where there is a split of authority on an issue; (ii) where the statute's plain language is subject to more than one interpretation or does not indicate the answer; or (iii) when presented with a complex question of New York common law for which no New York authority can be found. *Riordan v. Nationwide Mut. Fire Ins. Co.*, 977 F.2d 47, 51 (2d Cir. 1992).

However, even where the law of a state may be uncertain, a federal court may deny certification where it believes it can "predict" how the state court would resolve the ambiguity. *Travelers Ins. Co. v. 633 Third Assocs.*, 14 F.3d 114, 119 (2d Cir. 1994). In making this prediction, the federal court may be guided by decisions of lower state courts, *In re Brooklyn Navy Yard Asbestos Litig.*, 971 F.2d 831, 850 (2d Cir. 1994), and relevant cases from other jurisdictions. *Bank of New York v. Amoco Oil Co.*, 35 F.3d 643, 650 (2d Cir. 1994).

Petitioner contended that Respondent was liable for legal malpractice in failing to perfect the Article 78 proceeding. To prevail on a claim for legal malpractice under New York law, a plaintiff must demonstrate "(1) a duty, (2) a breach of the duty, and (3) proof that actual damages were proximately caused by breach of that duty." *Marshall v. Nacht,* 172 A.D.2d 127, 569 N.Y.S.2d 113, 114 (2d Dept. 1991). Respondent contended that had the Article 78 proceeding been perfected, it would not have been successful.

Accordingly, Petitioner could not show that the failure to perfect the Article 78 proceeding caused Petitioner any damages. On appeal to the Court of Appeals for the Second Circuit, Petitioner claimed that the District Court erred in deciding the issue of causation as a matter of law, contending that the question of whether the Article 78 proceeding would have succeeded was a factual matter to be resolved by a jury. (Appendix A, A-6).

In affirming the District Court, the Second Circuit acknowledged that there was a dearth of case law addressing this issue in New York. *Id.* The Second Circuit initially relied on existing trial court precedent as set out in *Katsaris v. Scelsi*, 453 N.Y.S.2d 994, 996 (Sup. Ct. Broome Co. 1982) ("The judge . . . must determine what the appellate court would have done . . .") and *Nunez De Villavicencio v. Cerny*, 662 F. Supp. 243, 243-44 (S.D.N.Y. 1987) (following *Katsaris* and determining, as a question of law, how the appellate court would have ruled). (Appendix A, A-7-8). Such reliance on these decisions by the Second Circuit is consistent with this Court's recognition that trial court decisions are "nevertheless laws of the state although the highest court of the state has never passed upon them." *West v. Am. Tel. & Tel. Co.*, 311 U.S. 223, 237 (1940); *see also City of Houston v. Hill*, 482 U.S. 451, 470 (1987) (recognizing that trial rulings on questions of state law are binding).

The Second Circuit then relied on decisions of other jurisdictions citing *Steeves v. Bernstein, Shur, Sawyer & Nelson, P.C.*, 1998 Me. 210, 718 A.2d 186, 191 (Me. 1998) ("numerous courts have recognized that the determination of whether an appeal not taken would have been successful is within the exclusive providence of the court, not the jury." *Id.*) and *Charles Reinhart Co. v. Winiemko*, 444 Mich. 579,

513 N.W.2d 773, 783-84 n.40 (Mich. 1994) (noting that at least nineteen jurisdictions have concluded that the determination of whether an appeal would have been successful is a question of law and that "no reported cases have held otherwise") (citing cases). (Appendix A, A-8). In holding that the District Court properly decided that the determination of causation of damages on the facts presented was exclusively a question of law, the Second Circuit stated that to rule otherwise "would misconstrue the very nature of appellate review." (Appendix A, A-8). Notably, Petitioner has not cited and cannot cite a single case which holds to the contrary.[6]

Petitioner misstates the scope of the Second Circuit's decision describing the question broadly as "the complex issue of causation." In fact, the Second Circuit declined to certify the question specifically noting "the narrowness of the issue presented and the unanimity of extensive president — both in New York and out of New York." (Appendix A, A-7). Even where this Court has recognized the importance of federal abstention pending certification, this Court has recognized that the availability of certification is not in itself a sufficient reason to abstain from deciding an issue of state law. *Bellotti v. Baird*, 428 U.S. 132, 151 (1976).

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6. Three additional states have recently concluded that the determination of whether an appeal would have been successful is a question of law. *See Sturgis v. Skokos*, 335 Ark 41, 51, 977 S.W.2d 217, 222 (Ark. 1998) (matter of proximate cause for failure to file an appeal is a question of law to be decided by a judge); *Envtl. Control Sys., Inc. v. Andrews*, 301 Ill. App. 3d 612, 621, 703 N.E.2d 1001, 1008 (Ill. App. Ct. 1998) (the issue of proximate cause in an appellate legal malpractice case should be decided as a matter of law); *accord Dan Nelson Constr. Co. v. Nodland & Dickson*, 2000 N.D. 61, 608 N.W.2d 267 (N.D. 2000).

It is an inescapable conclusion that the Court of Appeals for the Second Circuit did not abuse its discretion in declining to certify the question of state common law presented in *Tinelli v. Redl* and Petitioner has not presented any valid reason for this Court to undertake review of the Second Circuit's decision.

B. By declining to certify an unresolved question of state common law to the highest court of the state, the Court of Appeals for the Second Circuit acted consistently with the precedents set out by this Court and created no conflict with the decisions of other Circuit Courts concerning the applicable principles for determining the propriety of certifying such questions.

As set out above, the Second Circuit acted in accordance with the principles articulated by this Court in deciding an unresolved question of state common law which did not present complex issues and for which there was uniform precedent both in New York and in the decisions of sister states. Accordingly, Petitioner has not demonstrated any conflict concerning the Second Circuit's declination to certify the underlying state law question to the highest state court and the decisions of this Court and the other Circuit Courts.

Petitioner claims that the Second Circuit's decision creates a conflict "with regard to its approach to resolving the issue of causation as a matter of fact or law." (Petition at 8). However, the resolution of the issue of causation, to the extent presented in the context of a state tort action, is a matter to be governed by the substantive law of the state and is an issue about which there may well be conflicts among the states.

> There is no general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or "general," be they commercial law or a part of the law of torts. And no clause in the constitution purports to confer such a power upon the federal courts.

Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938). "Whatever lack of uniformity this may produce between federal courts in different states is attributable to our federal system, which leaves to a state, within the limits permitted by the Constitution, the right to pursue local remedies diverging from those of its neighbors." *Klaxon C. v. Stentor Elec. Mfg. Co., Inc.*, 313 U.S. 487, 496 (1941).

Petitioner relies on two cases as evidencing this purported conflict. First, Petitioner cites *Henry v. Merck & Co.*, 877 F.2d 1489 (10th Cir. 1989) for the proposition that causation can become a question of law when there is no evidence from which a jury could find a causal nexus between the careless act and the injury. (Petition at 7). In *Henry*, the Tenth Circuit applied Oklahoma's negligence law to determine the liability of a chemical maker, who carelessly stored acid, for injuries sustained as a result of an intervening theft of the acid and its intentional misuse by the thief causing injury to a third party. Recognizing that Oklahoma had not addressed these precise factual circumstance, the Tenth Circuit analyzed the relevant case law of Oklahoma and concluded that "Oklahoma's application of the supervening cause doctrine would follow the analysis of the Nebraska Supreme Court." *Id.* 877 F.2d at 496. The Tenth Circuit looked to the existing law of Oklahoma and then looked to relevant precedent in other jurisdictions as did the Second

Circuit in *Tinelli v. Redl*. Petitioner has simply failed to show a conflict between the Second Circuit and the Tenth Circuit.

Petitioner then cites to *Peckham v. Continental Casualty Ins Co.*, 895 F.2d 830 (1st Cir. 1990) as supporting the existence of this purported conflict between the Circuits. (Petition at 7). The *Peckham* case simply discusses circumstances in which causation can be determined as a matter of law and in no way supports Petitioner's attempt to create a conflict between the Circuit Courts warranting review by this Court.

Petitioner argues that there is a "failure of circuit courts to engage in a uniform approach to addressing issues of substantive law when no controlling state precedent exists." (Petition at 9-10). Unfortunately, petitioner fails to show how the Second Circuit deviated from the principles articulated by this Court or how the Second Circuit's actions created a conflict with any other Circuit Court.

Petitioner's assertion that the Second Circuit's decision in *Tinelli v. Redl* creates a conflict with the First Circuit and the Tenth Circuit is nothing more than an assertion completely unsupported by the facts and cases relied upon by Petitioner. Accordingly, Petitioner's misleading characterization of a purported conflict provides no basis for this Court's review.

CONCLUSION

Petitioner raises no new or important questions. The Second Circuit determined that the issue presented in *Tinelli v. Redl* was neither unprecedented or complex and correctly decided the issue relying on lower court decisions and the uniform decisions of all other states that had previously considered the precise issue raised. There is simply no issue that must be resolved by this Court.

Wherefore, for the above stated reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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